ORIGINAL

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

[O'Connell, P.J., Sawyer, J. and Talbot, JJ.]

_____/

PATRICK J. KENNEY,

Plaintiff-Appellant,

v

WARDEN RAYMOND BOOKER,

Defendant-Appellee.

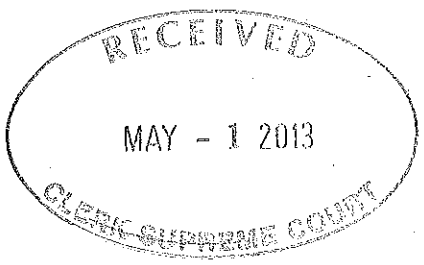
_____/

Supreme Court No. 145116

Court of Appeals No. 304900

Wayne Circuit Court
No. 11-003828-AH

PLAINTIFF-APPELLANT'S REPLY BRIEF



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I. UNDER MICHIGAN LAW, THE POWER TO GRANT THE WRIT OF HABEAS CORPUS IS NOT DEPENDENT ON LEGISLATION.

Defendant argues that the power to grant habeas corpus depends on "written law", likening a Michigan court's habeas powers to that of a federal court. After conceding that 1963 Mich. Const. Art. 6 see Sections 4 and 13 expressly grants Michigan courts the authority to "issue, hear and determine remedial writs", Defendant argues that "these provisions are not unique to Michigan Law", and then contends that this grant of jurisdiction is similar to that under the United States Constitution. (Brief p. 8.)

This argument is conceptually flawed. Although the federal constitution likewise guarantees that habeas corpus shall not be suspended, (U.S. Const. Art. 1 Sec. 6), nowhere does the federal constitution expressly grant habeas jurisdiction. As noted in *Felker v. Turpin*, 518 U.S. 651, (1996) (cited by Defendant), the United States Constitution expressly grants only limited jurisdiction to the courts and does not include a grant of habeas jurisdiction. Thus, the Michigan Legislature's power to regulate and limit the habeas jurisdiction of Michigan courts is substantively different than Congress's power to limit the habeas jurisdiction of federal courts.

II. NO MICHIGAN COURT HAS HELD THAT HABEAS REVIEW OF CRIMINAL OR CIVIL CONVICTIONS IS THE SAME UNDER THE CURRENT HABEAS STATUE AND THE COMMON LAW; SUCH REVIEW IS NOT AVAILABLE UNDER THE STATUTE.

While discussing the statutory language of 600.4310, which states that a statuary habeas action may **not** be brought by "persons convicted or an execution upon legal process civil or criminal", Defendant makes the confused argument that when examining this "statutory limitation", "this Court has not identified a different legal

standard for determining whether relief was available distinct from common law." (Defendant's Brief, p. 10.) However, according to the plain language of subsection 3, a person convicted or in execution upon criminal or civil process can **not** bring a statutory habeas claim. Presumably, this Court has not "identified a different legal standard" because there is no such review available under the statute.

In re Stone, 295 Mich. 207, 209 (1940), on which Defendant relies, proves Plaintiff's point. Defendant asserts that *Stone* was discussing the standard for granting statutory relief when it stated that habeas corpus "cannot substitute for a writ of error" and that "the writ deals only with radical defects rendering a proceeding or judgment absolutely void". After noting that the *Stone* Court cited common law cases when stating these principles, Defendant maintains that this demonstrates that the standards for granting habeas relief under the statute and under common law are the same.

However, in the paragraph immediately preceding the language cited by Defendant, the *Stone* Court stated:

> In compliance with the statute . . . petitioner alleged that he is not "convicted or in execution upon legal process, civil or criminal" and that **therefore he is entitled to prosecute the writ of habeas corpus**. If we find that petitioner is confined under legal criminal process, the proceeding must be dismissed.

Id. at 209; emphasis supplied. When placed in context, it is evident that the Court was discussing the ways by which the petitioner tried to avoid this statutory proscription (by alleging a radical defect rendering the judgment void, a remedy provided by common law), before concluding the petitioner was not entitled to relief.

Defendant cites several other cases which he claims support this position, beginning with *Lupu v. Denniston*, 285 Mich. 500 (1938). *Lupu* also proves Plaintiff's argument. In *Lupu*, the defendant was committed on civil process for contempt. His ex-wife brought a habeas petition on his behalf. This Court began its analysis by stating:

> In compliance with the mandate of the [habeas] statute, the petitioner has alleged 'that the said George Lupu is not committed or detained by virtue of any process, judgment, decree or execution specified in [the habaes statue]'. Unless the foregoing allegation is true, the petition must be dismissed under the statute . . . ."

This Court then concluded that Mr. Lupu was detained pursuant to civil process, rejected the contention that this proscription did not apply because the habeas action was brought "on behalf" of Mr. Lupu, and dismissed the case. *Id* at 502-503.

Reliance on *In re Joseph*, 206 Mich. 659 (1919) is equally misplaced. In *Joseph*, the habeas petitioner sought review of a civil commitment in the same circuit court which had rendered the commitment. The court stated that a judgment was "not open to collateral attack in habeas corpus proceedings brought in the **same court**", *id* at 661, but that an appellate court could "make use of the writ as one means of exercising its supervisory power . . . ." *Id* at 662. After noting that persons detained by virtue of final judgments of **courts** are detained "by due process of law", the court held that habeas relief was therefore generally excluded, but that a challenge could still be brought based on a "radical defect". The Court then noted that habeas statute likewise prohibited persons detained on civil or legal process from prosecuting the writ. *Id* at 662-663.

The reliance on *Ex parte Long*, 266 Mich. 369 (1934) is equally dubious. There, the Court discussed a habeas statute which, unlike MCL 600.4310, specifically allowed for review "whether the same shall have been for any criminal or supposed criminal matter, or not ([3 Comp. Law 1929] section 15225)." The Court concluded that none of the petitioner's claims (denial of a fair trial, denial of the right to counsel, denial of compulsory process to obtain material witnesses and denial of a motion for new trial) were properly raised on habeas.

With the exception of *Long*, which involved a materially different statute, the Court consistently held that habeas relief was unavailable under the statute because the provisions contained in what is now MCL 600.4310(3) barred habeas actions by persons convicted or in execution upon civil or legal process. Thus, the Court never ruled or implied that the standards were the same under the statute and common law.[1]

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[1] In *In re Jackson*, the Court did not "expressly examine the relationship between the statute and common law" regarding the applicable standards for granting relief, (Brief p. 11). Instead, the Court looked to whether it had the power to issue the writ when the person detained was outside the borders of Michigan. Both Justice Campbell's lead opinion and Justice Cooley's concurrence agreed that the Court derived its habeas jurisdiction not from the habeas statute, but through the common law and the Michigan Constitution. See Cooley, *id* at 438, and Campbell, *id* at 421. Justice Campbell concluded that the common law did not include the right to issue writs for persons held outside of Michigan, and that the habeas statue did not add this power, whereas Justice Cooley believed that the common law provided this power so long as the "jailer" remained within the boundaries of Michigan.

III. DEFENDANT'S ARGUMENT CONFLATES THE DISTINCTION BETWEEN PRINCIPLES GOVERNING HABEAS REVIEW OF JUDICIAL DECISIONS AND REVIEW OF NON-JUDICIAL DECISIONS.

Every case cited by Defendant for the proposition that there is a radical defect requirement involved habeas review of judicial detentions following criminal or civil process. Defendant ignores the context of these decisions and argues, without legal support, that these principles apply to habeas cases that do not involve judicial detentions. Defendant attempts to blur the distinction between judicial detention and non-judicial detention by referring to the detainees in the cases he cites as "criminal defendants" (Brief pp. 20-21) and referring to Mr. Kenney as a "criminal prisoner" (Brief p. 2, 22, 29). However, Defendant concedes that Kenney is detained as a result of an executive detention (Brief p. 3). Kenney's alleged status of "criminal prisoner", whatever that means, does not change the nature of his executive detention.

The cases cited by Defendant prove Kenney's point: the standards of review in habeas proceedings depends on whether the proceeding under review involves a judicial detention or a non-judicial detention. In *Browning v. Michigan Department of Corrections*, 385 Mich. 179 (1971), this Court granted habeas relief to a petitioner who challenged the MDOC's application of consecutive sentencing. Since the case did not involve a challenge to a criminal or civil conviction or sentence, the Court never discussed "radical defect" or "jurisdiction". Accord *Parks v. Department of Corrections*, 498 Mich. 925 (2013), another case not challenging a criminal or civil conviction, in which this Court reversed an order denying the plaintiff's habeas action because the MDOC "did not have authority to rescind a final order of discharge from parole."

Ironically, Defendant contends that *In re Vaughan*, 371 Mich. 386 (1963), should be "limited to its facts." (Defendant's brief p. 21.) *Vaughan* is on point and involved habeas review of a parole revocation proceeding. This Court granted relief after noting that the only proof at the revocation proceeding was a hearsay statement, and that the parolee was denied his statutory right to confront and contest the hearsay evidence because the hearsay declarants were not produced for the hearing. The Court did not find that the error amounted to a constitutional violation, much less a radical defect impugning jurisdiction. The Court concluded simply that the writ should be granted because "it is obvious that petitioner's present detention and confinement is illegal." *Id* at 394. This is the standard articulated in MCL 600.4352.

Defendant maintains that *Vaughan* represents a departure from Michigan's habeas jurisprudence. (Brief pp. 17-21.) However, what this case really represents is a recognition by the Court that the context of the detention determines the standard that applies, and that judicial detentions, where the courts can provide at least minimal due process guarantees, are treated differently that non-judicial detentions, where the courts cannot perform their traditional role of oversight.

In fact, within the context of judicial detentions, there would appear to be distinctions.[2] After discussing the habeas standards in criminal and civil conviction

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[2] Defendant maintains that Kenney relied on *Fritts v. Krugh*, 354 Mich. 97 (1958) for the proposition that the standards for habeas relief have evolved and expanded and that *Fritts* was reversed by *Hatcher v. Department of Social Services*, 443 Mich. 426 (1993). (Defendant's Brief p. 22, footnote 23.) This is misstatement. Kenney cited *Fritts* for the proposition that a court could grant habeas relief even when the lower court had jurisdiction of the person and subject matter when the order resulting in detention clearly exceeded the lower court's statutory authority. (Kenney brief p. 28.) *Hatcher* did not even involve a habeas action so it obviously did not contain any ruling about habeas standards or their evolution. *Hatcher* reversed *Fritts* only to the extent *Fritts* held that the probate court lacked subject matter jurisdiction of a permanent child custody proceeding because of insufficient evidence produced at a preliminary custody hearing. Kenney did not cite *Fritts* for the proposition that a lack of

cases, Defendant noted the following cases where the Court did not require a "radical defect": *Ex parte Bobowski*, 313 Mich. 521 (1946) (Court granted writ where habeas petitioner was not given adequate opportunity to present defense to the charge of probation violation); *In re Gordon*, 301 Mich. 224 (1942) (Court granted writ to involuntarily committed mental patient where proofs used to support the commitment were insufficient and summary in nature); *Ex parte Miller*, 303 Mich. 81 (1942) (Court granted writ to involuntarily committed patient because only proofs offered were certificates of two examining psychiatrists and probate court otherwise failed to conduct full investigation). (Brief pp. 17-18.)

Defendant contends that these cases represent disparate "lines" but that the differences are reconciled by Justice Riley's concurrence in *People v. Carpentier*, 446 Mich 19 (1994) (Brief pp. 18-19). Justice Riley's concurrence in *Carpentier* involved a motion for relief from judgment under MCR 6.500, (a rule of criminal procedure), and discussed only criminal cases. Thus, she did not "reconcile" any non-criminal cases. Her concurrence noted only the types of errors deemed sufficient to grant habeas relief from a criminal conviction. *Id* at 45-46.

Defendant next argues that the exclusionary language in MCL 600.4310(3) is not limited solely to judicial detentions. Defendant argues, without any authority, legal or otherwise, that the term "legal process" is not limited to judicial proceedings and that "the better understanding of 'legal' here is that the court or officer claims the detention is supported in law, i.e., is 'legal'." (Brief, p. 25, fn 12.) Defendant's nonsensical

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evidence equated with a lack of subject matter jurisdiction.

argument ignores the rest of the language in subsection 3 that informs and modifies the phrase "legal process": "legal process, civil or criminal." "Legal process" cannot be read in isolation. Legal process modified by "civil or criminal" clearly demonstrates a reference to court proceedings; no executive or legislation body issues criminal or civil legal process. Further, it is absurd to contend that the legality of the detention depends on whether the officer or court "claims the detention is supported by law, i.e., is legal". No sane officer whose decision caused detention would "claim" the detention was unsupported by law or was illegal.

Defendant also cites *Trentadue v. Buckler Lawn Sprinkler*, 479 Mich. 378 (2007), for the position that when a statutory scheme "designates specific limitations and exceptions" the Legislature is presumed to intend to replace the common law. Plaintiff agrees to the extent that the statute applies only to non-judicial detentions. Section 600.4352 sets forth the legal standard for obtaining habeas relief and contains no "jurisdictional " or "radical defect" requirement. It also contains no limitation on habeas relief based on 1) the availability of an appeal or other direct review; 2) the types of issues that can be raised.

IV. THE STANDARDS FOR GRANTING HABEAS CORPUS INVOLVING EXECUTIVE DETENTIONS ARE DIFFERENT, AND PROBATION VIOLATIONS ARE NOT EXECUTIVE DETENTIONS.

Defendant agues there is no difference between the standards for granting habeas relief for executive or judicial detentions, and suggests this Court has previously held, in effect, that there is a requirement to show a defect in jurisdiction or its equivalent in either case. Defendant relies on a quote from *Ex parte Satt*, 164 Mich. 472, 475 (1911). (Brief, p. 35.) However, in *Satt*, the Court dismissed the habeas

action because the judgment of probation violation was not a "nullity". A probation violation is a judicial proceeding, not an executive one. In the cases cited by Defendant that involve parole revocation, *Ex parte Casella*, 313 Mich. 393 (1946) and *Ex parte Dawsett*, 311 Mich. 588 (1945), as well as *Vaughn, supra*, (all executive detentions) the Court simply examined whether the parole board complied with the statutory requirements that governed it, and never required a radical defect, jurisdictional error or its equivalent.

V. THE 1963 MICHIGAN CONSTITUTION DID NOT ADOPT THE HABEAS COMMON LAW AS IT EXISTED IN 1835.

Defendant suggests that Michigan habeas law was somehow frozen in time, and the state of the common law that existed in 1835, when Michigan adopted its first constitution, was also adopted by the constitution of 1963. He then suggests, without legal support, that this Court should turn back the hands of the clock 150 years and ignore all the common law developments that occurred since 1835 and implement the law as it existed then. (Brief, pp. 14, 29-30.)

In re Palm, 255 Mich. 632, 635 (1931), the Court stated, "No part of an old constitution survives adoption of a new one; the later in all respects supercedes the earlier." It would seem beyond peculiar, then, that the 1963 Michigan Constitution would adopt the habeas law that was in effect in 1835 and ignore the common law developments, both state and federal, that occurred in the 128 years after the first Michigan Constitution was ratified.

Defendant also suggests that Michigan common law on habeas is distinct from federal common law after 1835, but not before. (Brief, pp. 29-30.) Defendant cites no

authority for this even more peculiar contention, but claims that the authority cited by Plaintiff, *Cross v. Department of Corrections*, 103 Mich. App. 409 (1981), for the proposition that habeas relief in Michigan courts is co-extensive with the relief in federal courts was "superceded" by MCR 6.500. However, *Cross* did not involve a challenge to a criminal conviction or sentence. *Id* at 415. Since MCR 6.500 applies only to challenges to criminal convictions or sentences, it is difficult to understand how *Cross* could be "superceded" by the adoption of 6.500.

As the United States Supreme Court stated in *Lonchar v. Thomas*, 517 U.S. 314, 322 (1996), "the writ has evolved into an instrument that now demands not only conviction by a court of competent jurisdiction, see *In re Coy*, 127 U.S. 731, 756-758 (1988), but also application of basic constitutional doctrines of fairness, see *Jones v. Cunningham*, 371 U.S. 236, 243 (1963)." Thus, by the time of the ratification of the 1963 Michigan Constitution, the writ had evolved into an instrument that demanded "application of basic constitutional doctrines of fairness." The state of habeas common law articulated in *Jones* was therefore the common law at the time the Michigan Constitution was ratified in 1963.

Respectfully submitted,

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